Miami Rivet of Puerto Rico, Inc., Miami Rivet Company and Raytech Corporation *and* International Association of Machinists and Aerospace Workers, AFL–CIO. Case 24–CA–6196

August 25, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On February 22, 1993, Administrative Law Judge Joel A. Harmatz issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge dismissed complaint allegations that the Respondent violated Section 8(a)(5) and (1) by (1) refusing to provide the Union with certain information concerning the effects on unit employees of its decision to close part of its Carolina, Puerto Rico operations, and (2) refusing to bargain about the effects of its partial closing decision. As explained below, we reverse in pertinent part. We find that the Respondent violated Section 8(a)(5) by refusing to provide certain information about layoffs, but not other information that is irrelevant to effects bargaining. We also find that the information which was unlawfully denied the Union precluded meaningful effects bargaining.[1]

I. THE FACTS

The Respondent manufactures rivets in Puerto Rico and Florida. On January 2, 1990,[2] the Union filed a representation petition. An election among production and maintenance employees at the Respondent's Carolina, Puerto Rico plant was held on February 15. On February 23, the Union was certified as the exclusive bargaining representative for these employees.

At the parties' initial meeting on March 6, the Respondent announced its decision to cease production of rivets at its Carolina plant for export to the United States. The Union was informed that about 15 of the 29 unit employees would be laid off by seniority, except where efficiency or expertise required otherwise. According to the Union's minutes from this meeting, taken by Grand Lodge Representative Juan Maldonado, the Respondent agreed the following week to inform the Union of the identity of employees affected by the layoff.[3] The Respondent suggested that the parties meet on March 14 to discuss the effects of the decision to partially close.

Maldonado's minutes show that he apprised the Respondent as follows:

> . . . will accept [the invitation] if I am prepared for it, because I will perhaps request further information. . . . Will confirm Monday or if the information is not available will convey to them that I am not prepared for meeting.

The Respondent confirmed its partial closing decision by letter to the Union dated March 6:

> [T]he Company will terminate part of its Puerto Rico operations sometime during the last week of March or the first week of April . . . . the change in the scope of the operation in Puerto Rico will result in the termination of approximately 15 employees. This termination will be done following seniority . . . . We will notify you in the near future the list of employees who will be terminated as a result of this decision . . . .
>
> Finally, rest assured that the Company will meet at your request to discuss the effects which this decision will have on the employees. To this effect, we suggest to meet again next Wednesday, March 14 . . . . You will notify [us] by next Monday, March 12, whether you want to meet on said date or some future date.

By letter dated March 8, the Union requested certain information and documents. The complaint is narrowly drafted to allege that the Respondent unlawfully failed to respond to the following four requests for information:

> (1) Does the Company enjoy tax exemption? If so, provide copy of the document.
>
> (2) Is the product to be relocated covered by the tax exemption? If so, since when and for how many years?
>
> (3) Have [sic] the Company notified Fomento [industrial agency[4]] and/or any other government

[1] There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening to close its plant if it were unionized.

[2] All dates are in 1990 unless otherwise indicated.

[3] The Union's minutes state, ''[T]hat the persons affected will be notified sometime next week to the Union.'' The Respondent, which sent a letter stating that its business had been liquidated and that it would not defend or appear at the unfair labor practice hearing, submitted no evidence concerning this meeting or any other matter at issue.

[4] Based on Maldonado's testimony, the judge found that FOMENTO is the agency established to foster industrial development in Puerto Rico through private sector investment from enterprises based in the United States. It administers eligibility for tax concessions honored by the Internal Revenue Service.

agency about the plant closing? When? To whom and by whom? If so, provide copy of notification.

(4) What is the precise timetable for the relocation of the product and layoff of the affected workers. Please provide copy of layoff notice to workers.

On March 12, Maldonado telephoned the Respondent and said that the Union could not meet on Wednesday, March 14, to bargain about effects because the Union had not received the information requested. Maldonado stated that once the Union received and evaluated the information, it would be prepared to bargain.[5]

By letter dated March 15, the Respondent refused to provide the requested information. The Respondent told the Union that the information implicated ''the very heart of the decision'' and was not needed for effects bargaining. The Respondent again suggested that the parties meet at the Union's convenience to discuss the effects of the decision.

On March 16, 14 employees were laid off. By letter to the Union dated March 15, the Respondent purported to give timely notice of the layoff and the names of employees laid off. This letter, however, was not postmarked until March 30. Further, it was not actually received by the Union until April 4, a full 2 weeks after the layoff. Enclosed, were copies of individual termination letters to unit employees dated March 16.[6] The Respondent's letter to the Union again requested that the Union advise the Respondent when it wanted to bargain on effects.

By letter dated March 20, the Union told the Respondent it had not adequately complied with the March 8 information request. The Union reiterated its March 8 request and asked for additional information. By letter dated March 29, the Respondent replied that its March 15 response fully satisfied its legal obligations. The Respondent also answered the Union's new inquiries regarding the impact of the Company's decision.[7] Further, the Respondent again suggested that the parties meet ''to discuss the effects which the Company's decision has had on the bargaining unit employees.''

[5] The Union confirmed this telephone conversation by letter dated March 16.

[6] These termination letters were, at some unspecified point, given to the laid-off employees. The termination letters informed affected employees that the Respondent would meet ''shortly'' with the Union to discuss the effects that this decision had on them. Further, the employees were paid accrued wages and vacation pay and were apprised of their option to continue in the Respondent's medical plan at their own expense (COBRA rights).

[7] There is no claim by the General Counsel that the Respondent failed to fulfill its statutory obligations regarding the Union's March 20 information request.

II. THE JUDGE'S LEGAL ANALYSIS

A. *The March 8 Information Request*

The judge dismissed complaint allegations concerning the Respondent's refusal to provide the requested information. The judge found that information items 1 and 2 of the complaint concerning possible forfeiture of special tax benefits, did not directly involve ''wages or hours'' and were not so ''intrinsic'' to the core of the employment relationship as to be ''presumptively relevant.'' The judge—quoting selected portions of Maldonado's testimony given in response to the judge's questioning—characterized Maldonado's explanations as admissions of an intent to use the requested information ''to ensnare the Respondent in collateral legal offenses of no aid to the formulation of bargaining positions.'' Therefore, the judge found that the Union's request for these two items was intended to gain ammunition for ''[b]lackmail'' efforts to pressure the Respondent in a manner inconsistent with good-faith bargaining. He concluded that this information had not been shown to be relevant to the Union's statutory functions and, therefore, the Respondent's denial was permissible.

With respect to item 3—Respondent's filing with FOMENTO—the judge interpreted Maldonado's testimony to mean that this information was sought solely to assess whether the Respondent's partial closing decision was itself an unfair labor practice. The judge likened the Union's request to an improper discovery request.

With respect to item 4 (''the precise timetable for the relocation of the product and layoff of the affected workers'' and a ''copy of layoff notice to workers''), the judge made several findings. In short, he found that the Respondent's 18-day delay in providing a copy of the layoff notice, to the extent not caused by ordinary delays in the mail, was not unreasonable or inherently indicative of bad faith, and did not create any abnormal impediment to bargaining about effects.

With respect to the requested ''timetable for relocation,'' the judge found no relocation of the product. He found it ''inconceivable that, apart from the layoff, any calculable timetable would exist.'' Further, the judge stressed that the Respondent had informed the Union at the March 6 meeting that it would close part of its operations in late March or early April. Also, the Respondent had given the Union its estimate of the approximate number of employees to be laid off. The judge concluded that the ''changeover'' was complete on March 16, that the Union was notified of this fact in ''timely fashion,'' and that ''there was no need to stage out, on a step-by-step basis, the implementation of the decision beyond that date.''

Accordingly, the judge dismissed all 8(a)(5) refusal-to-provide-information allegations.

B. *Effects Bargaining*

The judge also dismissed the 8(a)(5) allegation of a refusal to bargain about effects. The judge emphasized that the Respondent's March 6, 15, and 29 letters invited the Union to discuss effects bargaining. He found no evidence that the Union sought effects bargaining after it had canceled the March 14 meeting.

Further, the judge rejected the Union's explanation that it need not have bargained without the requested information. Assuming for argument's sake that the Union was lawfully entitled to the requested information, he found that the Union still had a continuing obligation to meet and confer about effects issues on and after March 14. The judge concluded that the General Counsel improperly sought to parlay a refusal to provide information into a derivative refusal to engage in effects bargaining in order to obtain a *Transmarine* backpay remedy.[8]

III. ANALYSIS

As further explained below, we agree with the judge that the Respondent lawfully refused to provide complaint items 1, 2, and 3 of the requested information. Contrary to the judge, however, we find that the Respondent unlawfully refused to provide complaint item 4, and that this refusal precluded meaningful effects bargaining.

A. *Refusal-to-Provide-Information Allegations*

We conclude that the information sought in items 1, 2, and 3 of the complaint is not presumptively relevant and necessary to the Union's proper performance of its statutory obligation to represent unit employees in effects bargaining. Further, the General Counsel has not established the actual relevance of this information for this purpose.

In items 1–3, the Union seeks to ascertain whether the Respondent enjoys a tax exemption and whether it had notified governmental authorities about its plant closing decision. That information does not itself concern terms and conditions of employment. At most, it concerns the issue of whether Respondent has complied with certain requirements for a tax exemption. Thus, the information is not presumptively relevant.

The General Counsel contends that the information concerns the effect of the decision to partially close. That is, an effect of that decision was the layoff of employees. According to the General Counsel, the information would establish that such a layoff would be contrary to the requirements of the tax exemption. The record, however, contains no evidence to support a reasonable belief that the information would establish that fact. There is only the speculation that the information might establish that fact. Accordingly, the Respondent did not violate the Act by refusing to provide this information.[9]

By contrast, item 4 sought the precise timetable for the Respondent's layoff and a copy of the layoff notice given to affected workers. This request is plainly relevant to effects bargaining. Those effects included the layoff, patently itself a mandatory bargaining subject. That is so even where, as here, the layoff is an effect of an entrepreneurial decision that is not alleged to be subject to bargaining.[10]

Accordingly, we find that the timetable for the layoff and a copy of the layoff notice sent to workers was relevant to meaningful effects bargaining over the Respondent's partial closing decision. By failing to furnish the Union with this information, the Respondent refused to bargain in good faith and violated Section 8(a)(5) and (1) of the Act.

B. *Refusal to Engage in Effects Bargaining*

We also find, contrary to the judge, that the Respondent's unlawful refusal to provide the Union with the layoff information above, undercut the Respondent's offer to engage in effects bargaining, and pre-

[8] *Transmarine Navigation Corp.*, 170 NLRB 289 (1968).

[9] Even if the Union had demonstrated a reasonable belief based on objective fact that the information requested was relevant and necessary to effects bargaining, which it did not, Member Cohen would not permit the Union to use the information for avowed ulterior purposes. Like the judge, he finds, on this record, that the Union was fishing for collateral obligations to pressure the Respondent to change its decision to go partially out of business. For this additional reason, Member Cohen finds that the Union was not entitled to information items 1–3.

Contrary to his colleagues, Member Truesdale would find that the information sought in items 1, 2, and 3 of the complaint was relevant to bargaining about the effects on unit employees of the Respondent's partial closing decision. The information sought regarding the Respondent's tax exempt status and its notification to FOMENTO would allow the union to assess whether the Respondent had retained the ''minimum number of employees'' sufficient to qualify for a tax credit and had satisfied its obligation to notify both the agency administering eligibility for tax concessions and the union administering its collective-bargaining responsibilities of the bona fide reasons for its actions. In Member Truesdale's judgment, this information would facilitate the Union's attempts to persuade the Respondent to limit the impact on unit employees of the partial closing and consequent layoff of approximately half of the work force.

Member Truesdale agrees with the General Counsel that although the partial closing itself was not alleged to be unlawful, it could nonetheless violate the Respondent's agreement with FOMENTO concerning the nature of its operation and the minimum number of employees of it was required to retain; the requested information could be used to monitor the Respondent's compliance with its legal obligations that impinged on the breadth, extent, and costs of the partial closing decision. Member Truesdale would find nothing untoward in the Union's efforts to ensure that the Respondent was complying with its legal obligations to retain tax-exempt status, and to determine whether the information requested could be used as additional leverage in effects bargaining with the Respondent.

[10] *Litton Business Systems*, 286 NLRB 817, 820–821 (1987), enfd. in pertinent part 893 F.2d 1128, 1133–1134 (9th Cir. 1990), revd. on other grounds 111 S.Ct. 2215 (1991). See also *Fast Food Merchandisers*, 291 NLRB 897, 899–900 (1988).

cluded meaningful effects bargaining. On March 6, the Respondent had informed the Union that it anticipated implementing the layoff during the last week of March or the first week of April. The layoff actually occurred on March 16. Despite the Union's March 8 request for the precise timetable of the layoff and copies of the layoff notices to workers, the Union was not notified of the March 16 layoff date, or of the names of employees selected for layoff until April 4—i.e., the day it received the Respondent's letter, dated March 15, but not actually mailed until March 30.

The Respondent's belated failure to provide this information prevented the Union from receiving timely notice of the actual date of the layoffs until well after they occurred. As noted, the Union had been led to believe that the layoffs would not take place until at least a week later. Had the information relevant to the layoffs been timely furnished, the Union would have been in a better position to bargain over the number of employees laid off and the identities of those selected. In this regard, it must be reiterated that the entrepreneurial decision was the decision to cease producing rivets in Carolina for distribution in the Union States. The question of how many employees would be laid off as a result, and how many might be kept on for production of rivets for local distribution, was clearly a bargainable subject.[11] As it was, the Union was presented with a fait accompli on these ''effects'' issues.

It is well established that ''[b]argaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and [the Board] may impose sanctions to ensure its adequacy.''[12] Here, the Respondent effectuated the layoffs 2 weeks prior to the time that it had informed the Union that the layoffs would be implemented. Likewise, the Union was not provided with the names of the individuals actually laid off until more than 2 weeks after the layoffs. We find that the Respondent's refusal to provide this information in a timely fashion removed the possibility of fruitful effects bargaining.

The Respondent, of course, had offered to bargain about effects on March 14. But, as Maldonado informed the Respondent, the Union did not have the relevant information that it had requested at that time. The Union is not required to begin bargaining at a time when relevant information is being unlawfully withheld.

Thus, consistent with Board precedent, we find that the Respondent's unlawful refusal to provide relevant information about the layoff privileged the Union's refusal to meet for effects bargaining on March 14. Further, we find that the Respondent's offers did not satisfy its obligation to bargain about effects and that the Union's failure to meet without the relevant layoff information did not constitute a waiver of its right to engage in effects bargaining. *FMC Corp.*, 290 NLRB 483, 488 fn. 14 (1988). In these circumstances, we conclude that the Respondent violated Section 8(a)(5) by depriving the Union of a significant opportunity to bargain in a meaningful manner and at a meaningful time about the effects on unit employees of the Respondent's partial closing decision.

THE REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent unlawfully refused to bargain with the Union about the effects of its partial closing on unit employees, we shall accompany our Order to bargain with a limited backpay requirement designed both to make employees whole for losses, if any, suffered as a result of the violation, and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so in this case by requiring the Respondent to pay backpay to its employees in a manner analogous to that required in *Transmarine Corp.*, 170 NLRB 389 (1968), and *Interstate Fuel Co.*, 177 NLRB 686 (1969).

Thus, the Respondent shall pay employees backpay at the rate of their normal wages when last in the Respondent's employ, from 5 days after the Board's decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union about those subjects pertaining to the effects on its employees resulting from its partial closing decision; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of our decision, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he/she would have earned as wages from the date on which he/she was laid off to the time he/she was recalled or secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.

[11] As the Board explained in *Litton Business Systems*, supra at 820 fn. 8, bargaining over ways of avoiding or minimizing permanent layoffs (such as by going to a shorter workweek for particular employees or rotating layoffs among employees) need not encumber the basic entrepreneurial decision to close a particular line of production.

[12] *First National Maintenance*, 452 U.S. 666, 681–682 (1981).

In addition to posting, we shall order the Respondent to mail a copy of the attached notice to each bargaining unit employee who was on layoff status or on the Respondent's payroll at its Carolina, Puerto Rico plant as of March 1, 1990, at his or her last known address, as disclosed in the Respondent's records.

ORDER

The National Labor Relations Board orders that the Respondent, Miami Rivet of Puerto Rico, Inc., Miami Rivet Company, and Raytech Corporation, Carolina, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to comply with the Union's request for information relevant and necessary to the Union's functioning as the collective-bargaining representative of the unit employees concerning the effects of the Respondent's partial closing decision.

(b) Failing to bargain with the International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive representative of its unit employees, about the effects on unit employees of its decision to partially close its Carolina, Puerto Rico plant.

(c) Threatening employees that the plant would close if they selected a union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union with certain relevant information about the effects on unit employees of its partial closing decision.

(b) On request, bargain with the Union over the effects on unit employees of the Respondent's decision to partially close its Carolina, Puerto Rico plant.

(c) Pay the employees, who were laid off as a result of the partial closing, backpay as set forth in the amended remedy section of this decision.

(d) Mail to all employees on its payroll at the facility in Carolina, Puerto Rico, as of March 1, 1990, copies, both in English and Spanish, of the attached notice marked ''Appendix.''[13]

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To chose not to engage in any of these protected, concerted activities.

WE WILL NOT fail to comply with the Union's request for information relevant and necessary for the Union's functioning as the collective-bargaining representative of the unit employees concerning the effects of our partial closing decision.

WE WILL NOT fail to bargain with International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive representative of our unit employees over the effects of our decision to partially close our Carolina, Puerto Rico plant.

WE WILL NOT threaten that we will close our plant if our employees designate a union as their representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish the Union with certain relevant information about the effects on unit employees of our partial closing decision.

WE WILL pay the employees, who were laid off as a result of the partial closing, backpay as set forth in the amended remedy section of this decision.

MIAMI RIVET OF PUERTO RICO, INC.,
MIAMI RIVET COMPANY AND RAYTECH CORPORATION

Virginia Milan-Giol, Esq., for the General Counsel.
LeGrande L. Young, Esq., of Shelton, Connecticut, for the Respondent.
Juan L. Maldonado, Grand Lodge Representative, of Rio Piedras, Puerto Rico, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. Upon an original unfair labor practice charge filed on June 29, 1990,

the General Counsel issued a complaint on August 31, 1990, alleging that the Respondent, Miami Rivet of Puerto Rico, Inc., violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening plant closure in the event the union were designated. The complaint further alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by (1) failing to provide information requested by the Union relevant and necessary to its duties as collective-bargaining representative, and (2) by terminating a portion of its operations, and, on that account, laying off unit employees, all without bargaining over the ''effects'' of that decision. In its duly filed answer, the Respondent denied that the unfair labor practices were committed.

On January 23, 1992, the General Counsel issued an amended complaint which included two additional allegations; the first setting forth that Miami Rivet of Puerto Rico, Inc., together with the additional Respondents named in the above caption constitute a single employer within the meaning of the Act, and, the second, being an 8(a)(3) and (1) allegation based upon the discharge of employee Jose R. Santini. No answer was tendered on behalf of the Respondent, and, in consequence, the General Counsel filed a Motion for Summary Judgment with the National Labor Relations Board (the Board) with respect to the undenied allegations. By Decision and Order dated July 20, 1992, the Board granted the motion, finding that the above-named Respondents constitute a single employer within the meaning of the Act, and that, as such, the Respondent is an employer engaged in commerce. The Board further found that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act, and that it is the certified exclusive representative of employees in the following appropriate collective-bargaining unit:

> *Included*: All production and maintenance employees employed by the Respondent at its place of business located in Carolina, Puerto Rico.
>
> *Excluded*: All other employees, office clerical employees, guards and supervisors as defined by the Act.

Finally, the Board found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Santini because of his union activities. The remaining issues, all framed by the pleadings on the original complaint dated August 31, 1990, were remanded for further proceedings. 307 NLRB 1390 (1992).

Pursuant thereto, a supplemental hearing was conducted by me on the issues in Hato Rey, Puerto Rico, on December 16, 1992. After close of the hearing, a brief was filed by the General Counsel.

I. PRELIMINARY STATEMENT

At times material, the Respondent was engaged in the manufacture of rivets at plants located in Carolina, Puerto Rico, and the State of Florida. Prior to the issues in controversy, the Respondent's Carolina plant was engaged in the manufacture of rivets for both the domestic Puerto Rican market and export to the United States. There was no history of collective bargaining for employees at this location. The Union filed a petition seeking a Board election on January 2, 1990,[1] and on February 15 the election was conducted among the production and maintenance employees at that location. The Union prevailed by a vote of 20 for, and 8 against, and, on February 23, was certified as exclusive bargaining representative.

The issues of primary concern in this supplemental proceeding derive from the Respondent's decision shortly after the certification to curtail production at the Carolina plant, and the resulting cutback of personnel in the newly established bargaining unit. The decision itself is unchallenged. Instead, it is alleged that the Respondent violated Section 8(a)(5) by failing to furnish the Union with requested information concerning this reduction, and by refusing to bargain in good faith concerning the effects of that decision. In a somewhat unrelated area, the complaint includes an allegation that, in the course the preelection campaign, a single employee was threatened by an alleged supervisor.

II. THE REFUSAL TO BARGAIN

A. *The Information Request*

Within 2 weeks after the certification, on March 6, the parties met for the first time. According to the Union's grand lodge representative, Juan L. Maldonado, the Company, through its attorney, announced that, as part of a plan to return Miami Rivet to profitability, the Carolina plant no longer would produce rivets for export to the United States. According to Maldonado's minutes,[2] it was explained that by producing these rivets at existing plants on the mainland, the Respondent would spare the shipping costs and delays under a system whereby raw materials were shipped to Puerto Rico, and then the cost cycle had to be repeated by returning the finished product to the United States for distribution and sale. Maldonado was told that, as a result, about 15 employees would be notified ''sometime next week,'' that they would be laid off. He was also informed that selection would be based upon ''seniority and expertise.''[3]

The Respondent apparently notified the employees later that afternoon of the Company's decision, the economic reasons for it, and the formula to be utilized in making layoff determinations. (G.C. Exh. 8.) Ultimately, on March 16, some 14 unit employees were laid off.

In the interim, by letter dated March 8, Maldonado requested additional information based upon the Company's declared intention to shift production from the Carolina plant. (G.C. Exh. 11.) This document is central to the allegation that the Respondent violated Section 8(a)(5) by refusing to provide relevant information.

Parenthetically, it is noted that a second meeting had been proposed by the Respondent for March 14 to discuss the ''effects of this decision.'' (G.C. Exh. 9.) Maldonado canceled that meeting by letter of March 12, on the stated ground that the information previously requested on March 8 had not been furnished. (G.C. Exh. 13.)

Maldonado's March 8 request was addressed by the Respondent in a letter dated March 15. In doing so, the economic factors bearing upon the decision were reiterated, with

[1] All dates refer to 1990, unless otherwise indicated.

[2] G.C. Exh. 7.

[3] Maldonado had previously drafted a request for information dated March 6, which he hand-delivered to the Respondent's attorney at this meeting. (G.C. Exh. 6.) There is no claim that the Respondent failed to fulfill statutory obligations in this respect. (G.C. Exh. 10.)

the observation that it was not based upon labor costs. In regard to the request for information, the Company explained:

> It is the company's position that the information required in your letter, which is not herein provided, goes to the very heart of the decision itself and not to the effects the same will have upon the employees. Therefore, we consider that the information requested is not needed by the Union to responsibly discuss and bargain with the Company the effects on the employees of the Company's decision.[4]

The General Counsel does not contend that the Respondent held any duty to bargain with respect to the decision to eliminate production for the mainland market. Nor is there claim that the Respondent was obligated to comply with the entirety of the demands set forth in the Union's letter of March 8. The complaint is drafted narrowly to place in issue only the Union's specific inquiries, as reproduced below:

> (1) Does the company enjoy tax exemption? If so, provide copy of the document.
>
> (2) Is the product to be relocated covered by the tax exemption? If so, since when and for how many years?
>
> (3) Have the company notified Fomento and/or any other government agency about the plant closing? When? To whom and by whom? If so, provide copy of notification.
>
> (4) What is the precise timetable for the relocation of the product and layoff of the affected workers. Please provide copy of layoff notice to workers.[5]

The General Counsel contends that the Union's request for information pertaining to the tax status, and ongoing eligibility for tax concessions, as described above, was relevant and necessary to the performance of the Union's duties as bargaining representative.

Items (1) and (2) relate to Internal Revenue concessions made to the Respondent.[6] The information sought would not directly involve wages or hours. As to such matters, the allegations are sustainable only upon affirmative proof that the information sought is either relevant or necessary to the Union's duties.

For, the Respondent's compliance with governmental standards for tax incentives is not so ''intrinsic'' to the core of the employer-employee relationship as to be ''presumptively relevant.'' See, e.g., *Newspaper Guild of San Diego, Local 95 v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977); *Ohio Power Co.*, 216 NLRB 987, 991 (1975). In contending that the Respondent was obligated to respond, the General Counsel relies upon Maldonado's explanation for the request, as follows:

> [T]o enjoy tax exemption in Puerto Rico, they have to reach an agreement, which is—it's a document which must be kept by FOMENTO—and, within that agreement, one of the conditions will be the minimum of employees that the company would commit themselves to have in a way to enjoy this tax exemption; will identify the product; and if—within the time the original agreement into enjoying the tax exemption, if any other product after accepting [sic] the tax exemption is modified, they also can get a new tax exemption.
>
> So with . . . that information, it would enable the union to know what was the commitment that the company had with the Government of Puerto Rico of keeping a minimum amount of employees. That information was to help me out in dealing with the Employer in reference to whether they had gone below that minimum or not. . . . [I]t would have served as a guidance to me to better represent the workers.

On questioning by me, Maldonado admitted that the information was sought solely ''to put pressure on the Employer in [the event that] . . . they had violated. . . . [requirements for tax concessions]'' The focus was sharpened in the following colloquy:

> JUDGE HARMATZ: . . . So, you wanted this information to use as a stick—
>
> THE WITNESS: That's correct, sir.
>
> JUDGE HARMATZ: —so that you could persuade.
>
> THE WITNESS: Correct, sir.

Item 3 relates to an alleged obligation on the Employer's part to notify FOMENTO in the event of a closedown. Maldonado explained the Union's interest in this information as follows:

> Well, . . . this closing down . . . came so timely to the result of the election. And . . . that information . . . [i]s required by FOMENTO anytime that an employer which is enjoying tax exemption is committed to provide.
>
> By receiving that information, [the Union] also, . . . [would] enable the union to be enlightened whether or not the company was really in good faith informing the union that they decided to close their operation based on the reason they gave the union.
>
> And, furthermore, by discovering more violations, if that was to be the case, I could have —have more— I would say ''power'' during the bargaining process as to the effect . . . .

Maldonado's explanation was unpersuasive. The request for information concerning the Respondent's tax status pertains to Federal laws encouraging industrial development through tax concessions to domestic U.S. firms that choose to operate subsidiaries in Puerto Rico. Maldonado portrays his efforts in this area as designed to ensnare the Respondent in collateral legal offenses of no aid to the formulation of bargaining positions, and alien to the employer-employee relationship. I find it unimaginable that discovery of embarrassing, incriminating, or criminal behavior on the part of either party could serve the ends of good-faith collective bargaining. Blackmail is a time-honored tool for breaking down

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[4] G.C. Exh. 14.

[5] The complaint was amended at the hearing to delete a further allegation that the Respondent made no effective return in connection with a request for ''a list of employees who are currently on disability and the reason.''

[6] As I understand Maldonado's testimony, FOMENTO was the agency established to foster industrial development of Puerto Rico through private sector investment from enterprises based in the United States. As part of that effort, FOMENTO administered the eligibility for tax concessions honored by the Internal Revenue Service.

the resistive will of an adversary, but Section 8(d), and the duty to furnish relevant information upon request, contemplates an atmosphere in which adversaries are expected to resolve their problems through open, frank, and reasoned discussion. Facts, whose only value lie in embarrassment or incrimination, are likely to exacerbate the relationship, while contributing to the dialogue only as a source of extraneous pressure. Accordingly, it is concluded that information as to the possible forfeiture of special tax benefits was irrelevant to the Union's statutory functions, and that the Respondent did not violate Section 8(a)(5) and (1) of the Act by failing to respond to the request for such information.

A different issue is raised by the request for a copy of the Respondent's filing with FOMENTO. Maldonado testified that the Respondent was obligated to notify FOMENTO, as to both the reduction and the reason for its action, and that a copy would enable the Union to evaluate whether the Employer's declared reason was honestly and consistently conveyed. As I understand Maldonado's testimony, the document was not sought for any purpose other than determination of whether the Respondent's unilateral decision to effect the change was an unfair labor practice. Under the precedent, Section 8(a)(5) does not furnish a means whereby a union might ''procure relevant evidence in the possession of an adverse party . . . to be used in pressing an unfair labor practice proceeding.'' *American Oil Co*., 171 NLRB 1180, 1184 (1968). Employers need not yield to discovery, in advance of hearing, under that process. Thus, a labor organization has no greater rights than the General Counsel to force advance disclosure of defenses to possible unfair labor practice allegations. *General Electric Co*., 163 NLRB 198, 210 (1967). Consistent therewith, in *Sahara Las Vegas Corp*., 284 NLRB 337, 344 (1987), it was held that there was no legal duty to furnish information under conditions which ''made it reasonable for the [r]espondent to conclude that [unfair labor practice] charges would likely follow concerning the termination of those employees for whom information was requested.'' The instant request is materially indistinct, for the relevance of the FOMENTO notification would be limited to exploration of the Respondent's defense under *Otis Elevator Co*., 269 NLRB 891 (1984).

As to item (4), the layoff notices were in fact provided. (G.C. Exh. 15.) Maldonado asserts, however, that they were not furnished until 2 or 3 weeks after the March 16 layoff, and that this delay precluded effective negotiation or opportunity to verify that the selections were made in conformity with the standards laid down by the Respondent. There was no rational explanation, however, to support this opinion, and even if Maldonado's testimony as to the delay was lacking in exaggeration, he would have possessed the data under conditions enabling effective discharge of union responsibilities. I am unaware of any absolute rule that ''effects'' bargaining over a layoff must take place during periods when the affected employees are still on payroll status. Here, the 18-day lapse between generation of the notices and their actual receipt by Maldonado was not inherently suggestive of a failure diligently to respond, or bad faith. The claim that their could be no meaningful bargaining after the employees were laid off seemed particularly self-serving since the Carolina plant retained a considerable work force. The opportunity for reasonable effects bargaining remained. It is concluded that the delay in responding between March 15 and April 4, to the extent not caused by ordinary delays in the mail, was not shown to have been unreasonable or to create any abnormal impediment to effects bargaining. The Respondent did not violate Section 8(a)(5) and (1) of the Act in this respect.

As for the request for the ''timetable for relocation,'' on the facts, it is concluded that there was no such information independent of the March 16 layoff itself. After that date, sales in the United States would be filled by existing plants on the mainland either newly manufactured or from finished inventory. Any increase in production at one location would result from an automatic, knee-jerk reaction to the layoffs which reduced productive capacity at the other. As explained to the Union in the Respondent's letter of March 15, there was no relocation of product ''since the Puerto Rico plant will continue to manufacture all the same types of rivets that are presently produced.'' Thus, the layoff in Puerto Rico would not have been associated with any shift in tangibles, such as equipment or product type, and hence it is inconceivable that, apart from the layoff, any calculable timetable would exist.[7] Thus, the changeover was completed on March 16, the Union was notified of that fact in timely fashion, and there was no need to stage out, on any step-by-step basis, the implementation of the decision beyond that date. The 8(a)(5) allegation in this respect shall be dismissed.

B. *The Refusal to Bargain as to the Effects*

The Respondent continuously by letters of March 6, 15, and 29, invited the Union to meet at its convenience to discuss the effects of its decision to reduce production at the Carolina plant. (G.C. Exhs. 9, 14, 18.) There is no evidence that the Union after it canceled the March 14 meeting ever sought such a meeting, or otherwise replied to the Respondent's various invitations to meet. In his testimony, Maldonado explained this as a deliberate undertaking because in his view it was pointless to meet until after the Union was possessed of the requested information.

Thus, it is clear that by this allegation, the General Counsel seeks to parlay a refusal to provide information into a derivative refusal to bargain which calls for a proportionately more consequential remedy. In no event would the refusal to provide information sanction any form of monetary reimbursement. On the basis of this derivative liability theory, however, the General Counsel specifically requests a remedy that would require that ''Respondent . . . make whole the employees it laid off . . . in the manner set forth by the Board in *Transmarine Navigation Corporation*, 170 NLRB 389 . . . (1968).''

Even assuming that the Union was lawfully entitled to all or part of the requested information, I am aware of neither authority, nor policy considerations that would excuse the Union from the continuing obligation to bargain in good faith in these circumstances. A refusal to furnish information, if unlawful, is correctable by statutory remedy, but this process does not license the aggrieved party to break off discus-

[7] Beyond that, the General Counsel concedes in her brief, and I agree, that, prior to the request for information, at the meeting on March 6, ''Respondent informed the Union . . . that it was closing down part of the operations at the end of March or the beginning of April and the approximate number of employees it anticipated would be laid off.''

sion as a self-help method to force capitulation. Were the rule otherwise, only the unenlightened would assume that good-faith discussion could ever take precedence over Board intervention and the availability of backpay. The duty to meet and confer at reasonable times under Section 8(d) remains the mutual obligation even though a party is not satisfied that it possesses all information to which it is entitled to under the Act. In the circumstances, as the Respondent was willing to meet, and as it was the Union that terminated the negotiations, the evidence does not suggest that the Respondent refused to bargain over the effects of its unilateral action at the Carolina plant. The 8(a)(5) and (1) allegation in this respect shall be dismissed.

III. THE CLOSEDOWN THREAT

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act when Jorge Hernandez threatened that the plant would close because of union activity. Angel Villanueva, a former machine operator at the Carolina plant, testified that, Hernandez, in a private conversation a few days before the election, stated, ''I can assure you that if the Union comes in, this company will be closed.''

In its answer, however, the Respondent denied that Hernandez was a statutory supervisor, or an agent whose conduct would be binding upon it. The burden was upon the General Counsel to prove that this was the case. *Commercial Movers, Inc*., 240 NLRB 288, 290 (1978).

In this respect, Hernandez was identified by Villanueva as the ''shipping supervisor.'' Consistent therewith, according to Villanueva, he wore a shirt which had the inscription ''supervisor.'' As described by Villanueva, Hernandez was in charge of a shipping clerk, a driver and about five inspectors. He would open the plant in the morning, and would step in to replace the plant manager when the latter took vacations or was away from the plant. In the absence of the plant manager, Hernandez would approve requests for time off. There is, however, no direct evidence that he had authority to hire, fire, layoff, suspend, or effectively to recommend such action. Nevertheless, Villanueva testified the Respondent maintained a policy prohibiting disrespect toward a ''supervisor.'' It is argued that Hernandez had to be a supervisor, because Villanueva knew that a coworker had been discharged for offending Hernandez in this manner. Some significance attaches to the fact that the Respondent did not list Hernandez as among its production workers either in responding to the Union's March 6 request for information,[8] or in preparing its *Excelsior* list preliminary to the election.[9] On balance, I am inclined to find that the evidence is inconclusive on the issue of whether Hernandez possessed or exercised, on any regular basis, the indicia of supervisory authority set forth in Section 2(11) of the Act.[10] On Villanueva's undisputed testimony, however, I am inclined to find that Hernandez was held out as part of the supervisory staff and, thus, one who acted under color of authority in addressing employees concerning management policy and intent. Accordingly, it is concluded that the Respondent violated Section 8(a)(1) in this respect.

CONCLUSIONS OF LAW

1. The Respondent, a single employer within the meaning of the Act, is engaged in commerce within the meaning of Section 2(6) and (7) thereof.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by threatening that the plant would close if employees designated the Union.

4. The unfair labor practice found above has an affect upon commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in a particular unfair labor practice, it shall be recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

[8] G.C. Exh. 10.

[9] G.C. Exh. 19.

[10] The testimony by Villanueva that Hernandez was a source of overtime and that the latter arranged the order of shipments did not persuade that any discretion was exercised by him in either regard. It is within contemplation that these matters might have originated at higher levels of management.